IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Nos. 79-231 and 79-232

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, GENERAL TELEPHONE COMPANY OF CALIFORNIA,

Petitioners,

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et. al.,

Respondents.

BRIEF OF INTERVENOR TOWARD UTILITY RATE NORMALIZATION (TURN) IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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INTRODUCTION

The instant proceeding is another effort by Pacific Telephone (Pacific) and General Telephone (General) to reap the benefits of revenues collected improperly. The entire factual history of the case was presented in prior petitions for Writs of Certiorari [Pacific Telephone & Tel. Co. v. PUC, U.S. Supreme Ct. Docket No. 78-606, 78-607, _____U.S.____, 58 L.Ed.2d. 713 (1978)]. As indicated in our brief in that case, petitioners are public utilities which were required by the California Supreme Court to rebate to the California ratepayers funds collected, but not used, for Federal Income taxes. Although the amount of the money collected exceeds one billion dollars, the instant decision orders only approximately 25% returned to the ratepayers (California Public Utility Commn Dec. 87838). Petitioners will be permitted to retain the balance of the improperly collected taxes. Seldom has a regulated public utility been

as handsomely rewarded for activities which were characterized by the California Supreme Court as representing examples of "imprudent management".

The procedural history of this case is set out in the opinion of Mr. Justice Rehnquist denying petitioner's application for stay (Pacific Telephone & Tel. Co., et. al. v. PUC., et al. (A-101 and A-102) August 13, 1979 _____U.S._____).

Petitioners allege that the Commission's Decision No. 87838, which ordered the partial refunds, will have adverse tax consequences. They seek a declaratory judgment and an advisory opinion from the Federal Court for the purpose of resolving this tax controversy. As petitioners correctly note in their statement of facts, the entire action was considered by this Court in 1978 (Pacific Telephone & Tel. Co. v. PUC, Docket Nos. 78-606, 78-607, supra.

TURN was a party in the prior proceedings, as well as in these proceedings.

Since there is substantial overlap in the issues presented by the two proceedings, we are incorporating our prior brief in the instant action.

INTEREST OF TURN

TURN is a non-profit California corporation which represents the interests of residential and small business customers of utilities such as petitioners. Our Board of Directors consist of people representing consumer groups, small business interests, and those concerned with the needs of our disadvantaged citizens.

It has been our position throughout the administrative and judical phases of this litigation that Petitioners are entitled to full reimbursement for their reasonable expenses of operation. This includes reimbursement for their actual income tax expenses and reasonable depreciation expenses as computed in a reasonably prudent manner.

TURN has actively participated in the original hearings before the California Public Utilities Commission. As a party to those proceedings, we also actively participatedin the administrative and judicial appeals in California, and to this Court (Pacific Telephone & Tel. Co., et. al. v. PUC, et. al., Docket No. 78-606 and 78-607, ____U.S.___, 58 L. Ed.2d. 713 (1978), Writ Denied, Dec. 11, 1978, rehearing denied, Feb. 21, 1979).

TURN's interest in preventing petitioners from retaining funds collected through imprudent management, has required us to intervene in the further litigation brought in the United States District Court for the Central District of California. In this regard, it bears noting that petitioners have deliberately chosen an inconvenient forum to pursue this litigation. The entire prior proceedings, both administratively and judicially, occurred in the Northern District of Calif-

ornia. Thus, all parties had retained Northern California counsel and expected the litigation to remain in this forum. Unaccountably, petitioners sought to discourage effective oppostiion by bringing the present action in Los Angeles [See Joint Appendix 17a, 21a; Cf Pacific Telephone & Tel. Co. v. PUC, Docket Nos. A-101 and A-102 ____U.S.____Opinion of Mr. Justice Rehnquist, Aug. 13, 1979]. Despite the inconvenient nature of this forum, all parties incurred the additional expenses needed to resolve the matter in Los Angeles rather than permit appellants additional delays. We believe that this petition should be quickly denied, and that all of the disputed funds promptly be distributed in a lump sum check to the affected California ratepayers.

JURISDICTION

This Court should not assume jurisdiction in this matter since Pacific raised issues not presented at earlier

stages of the litigation. Both petitioners received a full and fair review by this Court, as well as the California Supreme Court in 1978 when they brought the prior petitions for Writs of Certiorari (Pacific Telephone & Tel. Co., et. al., v. PUC, et. al., Docket Nos. 78-606 and 78-607, supra). We urge this Court to adopt the reasoning and views regarding this matter stated by Mr. Justice Rehnquist in his opinion denying the applications of appellants for a stay of the decision [Pacific Telephone & Tel., Co., et. al. v. PUC, (Docket Nos. A-101 and A-102, Aug. 13, 1979].

QUESTIONS PRESENTED

1) Are appellants barred from relitigating in Federal Court the merits of the Commission's Decision No. 87838?

2) May Pacific raise a question regarding Article VI, §14 of the California Constitution for the first time on this appeal?

3) What is the appropriate disposition

for this cause?

ARGUMENT

I

THE MERITS OF DECISION 87838, AND THE ALLEGED CONFLICT BETWEEN THAT DECISION AND FEDERAL TAX LAWS ARE NOT PROPERLY BEFORE THIS COURT

A. The Proper Treatment of Decision No. 87838 for Purposes of Federal Income Tax Laws is not Before This Court.

The decision which petitioners seek to enjoin arose from an interstate rate-making proceeding before the California Public Utilities Commission. Even petitioners recognize that the instant decision was a correct application of California Law. However, they argue for a declaratory judgment regarding the Federal Income Tax effects of that decision. This precise argument was presented in their prior petition for Writs of Certiorari from this Court. At pages 31 through 39 of our brief in response to that petition, we domonstrated the substantive errors in Petitioner's view of the Federal Tax Law. Pages 24 through 31, of that prior brief, argued

that this Court is precluded from rendering an advisory opinion in the nature of declaratory relief as requested by petitioners. Those arguments will not be repeated in this brief, but are incorporated by reference [Pacific Telephone & Tel. Co. v. PUC, (TURN Br. Nov. 1978, U.S. Supreme Court, Docket Nos. 78-606, 78-607)].

A taxpayer's desire to secure a binding resolution of a Federal Tax controversy, before committing himself, is hardly a unique situation. Often, the rules of an administrative agency make it difficult for taxpayers to avoid payment of taxes, or to secure certain tax benefits. Congress recently responded to the cries of the injured taxpayers by providing for limited declaratory judgments in order to resolve these controversies. These provisions are contained in Internal Revenue Code §7428. The procedural problems are discussed in cases such as in Animal Protection Institute Inc. v. United States, 78-2 USTC

¶9707 (Ct. Cl 1978). A brief review of this section reveals that it has no applicability whatsoever to the instant controversy. The provisions allow a non-profit organization which has secured its status from a state administrative agency to secure declaratory relief regarding an adverse Internal Revenue Service decision denying tax benefits to which the organization believes itself entitled. Thus Congress was aware of the problem confronting taxpayers, and specifically afforded an early remedy in those circumstances which warrant it. As pointed out in our prior brief, there are no good reasons for this Court to provide a declaratory relief remedy for these taxpayers which Congress omitted for other similarly situated taxpayers.

B. The Anti-Injunction Statute (28 U.S.C. §2283) Precludes the Requested Relief.

The scope of review for decisions of the Commission is exceedingly narrow. Traditionally, the Commission is presumed

to have dealt fairly with public utilities in fixing rates, and Federal Courts will not interfere absent a blatant confiscation of utilities' property (Los Angeles Gas & Electric v. CRC, 58 F.2d. 256 (DCC 1932, Aff'd. 289 U.S. 287; Ashbury Truck Company v. CRC, 58 F.2d. 263 (DCC 1931) Aff'd. 287 U.S. 570). The narrow scope of this review was emphasised by Congress in passing the anti-injunction statute. That Statute reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Congress or where necessary in aid of its jurisdiction, or to protect or affectuate its judgments." (28 U.S.C. 2283).

This statute has been specifically applied to cases such as the instant one [Oklahoma Packing Company v. Oklahoma Gas and Electric Company (1940) 309 U.S. 4]. In this case, the utility appealed to the Oklahoma Supreme Court from an order reducing its rates. That order was stayed

by the State Commission pending appeal. After the utility lost the appeal in the state court, it sought an injunction in the Federal Court. The United States Supreme Court dissolved the injunction on the theory that it was issued in excess of the provisions in the anti-injunction statute quoted above.

The effect of this statute cannot be avoided merely by framing the complaint in terms of declaratory relief, or seeking to restrain a non-judicial agency such as the regulatory commission instead of the state itself [Oklahoma Packing Company v. Oklahoma Gas & Electric Company, supra, Hill v. Martin (1935) 296 U.S. 393, N. 113; H. J. Heinz v. Owens (1951 C.A. 9th) 189 F.2d. 505, Reh. Den. 191 F.2d. 257, Cert. Den. 1952, 343 U.S. 905; City of Miami v. Sutton (1950) C.A. 5th, 181 F.2d. 644, 649].

C. The Doctrine of Res Judicata Applies to Bar the Present Suit.

Throughout both of appellant's petitions before this Court, they have argued that there is a conflict between the Internal Revenue Service and the California Public Utilities Commission regarding the appropriate interpretation of certain provisions of Federal Tax Law. The controversy has been simmering for over a decade. Nevertheless, neither petitioner chose to actually litigate the issue in the Tax Court, United States District Court or the Court of Claims in the manner provided for resolution of tax controversies. Instead, both utilities sought to litigate the issue before the Commission and the California Supreme Court. Three times the California Supreme Court considered the arguments and wrote unanimous opinions. These opinions explained that petitioners were guilty of imprudent management, and should be treated similarly to other utilities regarding these tax matters. Thus petitioners were required to take advantage of accelerated

depreciation and other provisions of the tax law. [City and County of San Francisco v. PUC (1971) 6 Cal.3d. 119, 130, 98 Cal. Rptr. 292; City of Los Angeles v. PUC (1972) 7 Cal.3d. 331, 102 Cal. Rptr. 313; City of Los Angeles v. PUC (1975) 15 Cal. 3d. 680, 125 Cal. Rptr. 779]. Finally, the instant decision was rendered, and appealed to the California Supreme Court. Having spoken three times previously, the Court denied the petition without further arguments or opinion. However, this denial still constituted an opinion on the merits and has res judicata effect [People v. Western Airlines (1954) 42 Cal.2d. 621, 269 P.2d. 723 (1954) Reh. Den., Appeal dismissed 348 U.S. 859. See also Napa Valley Electric Company v. Railroad Commission 251 U.S. 366 (1920); Francisco Enterprises, Inc. v. Kirby (9th 1970) 342 F.2d. 481].

The recent case of Montana v. United States, supra, (1979) ____U.S.____ 99 S.Ct. 970, 39 CCH S.Ct. Bull B. 995,

does not limit the scope of these principles. Montana v. United States, supra, involved the constitutionality of a one percent gross receipts tax upon the revenue of public contractors, which was not imposed upon private construction projects. At the insistance of the United States Government, one of its contractors brought a suit in the state court to contest the validity of that tax. After losing in the state court, the contractor then appealed to the United States Supreme Court. He then dismissed the appeal prior to a decision by this Court, and commenced a new action in the United States District Court making essentially the same argument regarding the invalidity of the tax. This Court reversed the decision of the District Court and held that the government was estopped by the prior resolution of the controversy in the Montana Supreme Court.

Our case presents an even stronger

claim for the application of estoppel since precisely the same parties are involved in both the state and Federal litigation, and no new issues or changes in the law are presented in the subsequent Federal case. Finally, in our case, the petitioners carried their petition for a Writ of Certiorari to this Court as well as seeking a rehearing after this Court denied the Writ. In contrast, the contractor in Montana v. United States supra, abandoned his appeal before receiving the decision of this Court. Similarly, neither of the present petitioners alleged the unfairness of the states procedures to which they voluntarily submitted and neither party contends that there were any changes in the controlling legal principles between this litigation in the state courts and the first petition to this Court, and the instant petition.

Likewise, the case of Brown v. Felson (1979) ___U.S.___ 60 L.Ed.2d. 767, 39

CCH S. Ct. Bull B. 2838 is of little comfort to petitioners. In that case, this Court found that a creditor in a collection proceeding filed in the state court, has little incentive to litigate bankruptcy issues which must be resolved in the Federal Court under §17 of the Bankruptcy Act. Consequently, the prior proceedings in the state court were not considered a bar to the receipt of further evidence in Federal Court. In contrast, all of the issues being considered in these Federal proceedings were vigorously presented on numerous occasions to the Commission and to the California Suprreme Court. In addition, the issues were presented for a decision to this Court last year (Pacific Telephone & Tel. Co. et. al. v. PUC, et. al. 78-606 and 78-707, supra.

Also, the debtor was required to actually be adjudicated a bankrupt before he could avail himself of the Federal

forum in Brown v. Felson, supra. In contrast, petitioners seek a resolution of their tax problems in the Federal Court without incurring any adverse consequences, whatsoever. They refuse to pay the refunds ordered by the state court, the Commission; and similarly refuse to pay the United States Government the taxes allegedly due. They truly seek to eat their cake and have it too.

II

PACIFIC RAISES A NEW ISSUE REGARDING THE CALIFORNIA CONSTITUTION ARTICLE VI, §14 WHICH WAS NOT PRESENTED PREVIOUSLY TO CALIFORNIA COURTS.

In its present petition for Writ of Certiorari, Pacific argues that the California Supreme Court had a duty to render a written opinion stating its reasons for denying the Writ of Review. In support of this position, it cites Article VI, §14 of the California Constitution. It should be noted that Pacific's prior citations to Article VI

were to the United States constiutional provision generally known as the Supremecy Clause. A review of the briefs reveals that the California Constitutional provision in Article VI, §14 has not been previously considered. If Pacific desired the consideration of that point, it should have filed a petition for rehearing in the California Supreme Court pursuant to Rule 27, California Rules of Court. This Rule gives the California Supreme Court the power to grant a rehearing after its own decision providing an appropriate petition is filed within 15 days after the filing of the decision. No such petition for rehearing was filed in the instant case.

When the California Supreme Court denied Pacific's petition for Writ of Review, it knew that no reasons were stated (See Joint Appendix, page 71a). Arguably, Pacific first learned that no reasons would be stated for the denial

of its petition when it received that document in the mail. However, had it filed for a rehearing, it could have raised this new point for consideration of the state Court. California Law permits the appellate courts to grant a petition for rehearing to consider the applicability of a new point not raised in the original petition (Traders and General Ins. Co. v. Pacific Employers Ins. Co. (1955) 130 Cal. Ap.2d. 158, 278 P.2d. 493).

Afart from this procedural problem, Pacific erroneously construes the meaning of this provision in the California Constitution. In fact, the denial of a petition without stating reasons is the normal California practice, and has the effect of binding the parties. For example, the recent criminal case of People v. Carrington 40 Cal.Ap. 647, 115 Cal. Rptr. 294 and appellant raised the issue of Article VI, §14 of the

California Constitution. The Court responded as follows:

> "An appellate court's denial without opinion of a petition for a writ of mandate is not a determination of a "cause" as the term is used in the Constitution. Only when the Appellate Court issues an alternative writ or order to show cause does the matter become a "cause" which is placed on the court's calendar for argument and which must be decided in writing with reasons stated. (People v. Medina, supra, 6 Cal.3d. at 490, 99 Cal. Rptr. at 633, 492 P.2d. at 689). But a decision, in common usage, is a determination arrived at after consideration (Webster's 3rd New International Dictionary (1965). A denial of a writ petition, without an opinion, is a decision for other purposes...". People v. Carrington 40 Cal.Ap. 647 at 650, 115 Cal. Rptr. 294 at 297.

In the instant case, the Petition for a Writ of Review of Pacific did not become a "cause" on the docket of the California Supreme Court because the matter was disposed of by a summary denial. Nevertheless, as provided by Rule 24 of the California Rules of Court,

it still became a binding decision of the California Supreme Court.

CONCLUSION

Throughout the tortured history of this case, the proceedings were held in San Francisco. All parties have counsel in San Francisco, and all parties were litigating this matter for many years in San Francisco. However, after this Court denied its petition for certiorari in 1978, petitioners unaccountably chose to move the dispute to Los Angeles. This had the effect of increasing the expense for the respondents, and allowing petitioners the luxury of forum shopping. Even Justice Rehnquist failed to notice this subtle switch in forums [CF Slip Op. August 13, 1979 denying the applications for stay U.S. Supreme Court Docket A-101 and A-102]. In view of the large benefits which accrue to petitioners from delaying the proceedings, we chose not to seek a change of venue. However, the cause presents a classic situation for

the application of the doctrine of Forum Non Conveniens [See James, Fleming Jr., Civil Procedure (1965) and cases cited at §12.17 r. 661]. It is noteworthy that TURN is the only organization directly affected by these increased costs since we are a private organization. In contrast, the petitioners can shift the burden to the ratepayers, and the other respondents may shift the increase to the taxpayers. We look forward to some relief from the burden imposed upon us by this unjustified switch of forums.[1]

The current decision requires the refund of only a small portion of the phantom taxes improperly retained by

[1] TURN recognizes that the other respondents may also be entitled to attorney's fees or other relief from petitioners for these actions. After the refunds have been made, the District Court can consider our motion for attorney's fees and other relief, as well as any such motions of the other parties.

* * * *

petitioners.

It is TURN's position that the Commission erred by failing to order the return of all these phantom taxes to the ratepayers. We recognize that a fourth of a loaf is better than none. For this reason, we urgedthis Court to deny the petitions for Writ of Certiorari when filed in 1978. All of those reasons still pertain to the instant proceedings. The only change in circumstances is that petitioners have secured free use of approximately one billion dollars in ratepayers' money without the requirement that the ratepayers be properly compensated for this privilege.

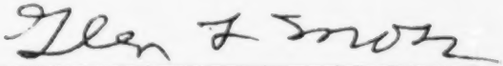
For the reasons stated in this brief, as well as in our prior brief in Docket Nos. 78-606 and 78-607, the Writs of Certiorari should be denied. However, this relief will not end the controversy since the underlying complaint is not fully consolidated with

this petition. We request that this Court transfer the matter to the United States District Court for Northern California with directions for that Court to dismiss the complaint with prejudice.

Respectfully Submitted:

Executed at Hayward California on September 7, 1979.

Edward M. Goebel, Esq.
Glen L. Moss, Esq.

by 
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